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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 262

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GARBUTT OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 28, 1937.
CERTIORARI GRANTED OCTOBER 11, 1937

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Names and Addresses of Attorneys.

For Appellant:

CLAUDE I. PARKER, Esq.,
BAYLEY KOHLMEIER, Esq.,

Bank of America Building,
Los Angeles, California.

For Appellee:

PEIRSON M. HALL, Esq.,
United States Attorney,

CLYDE THOMAS, Esq.,
Assistant United States Attorney,

Federal Building,
Los Angeles, California.

United States of America, ss.

To UNITED STATES OF AMERICA, and to PEIRSON M. HALL, its Attorney, and to HOMER S. CUMMINGS, UNITED STATES ATTORNEY GENERAL Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 2nd day of July, A. D. 1936, pursuant to Order Allowing Appeal filed June 2, 1936 in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain case entitled GARBUTT OIL COMPANY, a corporation, vs. UNITED STATES OF AMERICA, Docket Number 5094-H, wherein the Garbutt Oil Company is plaintiff and appellant and the United States of America is defendant and appellee to show cause, if any there be, why the judgment rendered against the plaintiff and appellant as in the said petition for appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable HARRY A. HOLLZER United States District Judge for the Southern District of California, this 2 day of June, A. D. 1936, and of the Independence of the United States, the one hundred and sixtieth

Hollzer

U. S. District Judge for the Southern District of California.

Service of the above Citation and receipt of a copy thereof, together with a copy of the Petition for Appeal, Assignment of Errors and Order Allowing Appeal herein is hereby admitted this 3rd day of June, 1936.

Peirson M. Hall
By E. H. Mitchell
Counsel for Defendant and Appellee.

[Endorsed]: Filed Jun. 3, 1936. R. S. Zimmerman Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ADMISSION OF SERVICE

Service of the Citation issued in the above entitled case on June 2, 1936 by Hon. Harry A. Hollzer, United States District Judge for the Southern District of California, and receipt of a copy of said Citation, together with a copy of the Petition for Appeal, Assignment of Errors and Order Allowing Appeal herein, is hereby admitted this 8th day of June, 1936.

.....

United States Attorney General
By Robert H. Jackson
Assistant Attorney General.

[Endorsed]: Filed Jun. 19, 1936 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk

DOCKET

DOCKET 5094-H

TITLE OF CASE: Garbutt Oil Company, a corporation

vs.

United States of America

Complaint to recover taxes illegally assessed and collected.

ATTORNEYS:

For Plaintiff: Claude I. Parker, John B. Milliken & Geo. H. Koster.

For Defendant:

DATE			FILINGS—PROCEEDINGS
Month	Day	Year	
Nov.	20	1931	Fld Complaint to recover taxes.
"	25	"	Fld affid of serv of compl upon U S Atty Genl; Fld affid of serv of compl upon U S Atty.
Jan.	29	1932	Fld stip and ord thereon extdg time to 2/21/32 deft to plead.
Feb.	24	"	Fld stip extg time to 3/21/32 deft to plead with ord thereon.
Mar.	21	"	Fld stip & ord thereon extg time 3/31/32 deft to plead.
"	23	"	Fld Answer of deft.

Sept.	7	"	Ent Cause on T T Cal Sept. term 1932.
"	12	"	Ent ord contg for term.
Feb.	1	1933	Ent Cause T T Cal Feb term 1933.
"	6	"	Ent ord contg term for settg N/A.
Sept.	6	"	Ent Cause T T Cal Sept term 1933.
"	11	"	Ent ord contg for term.
Jan.	31	1934	Ent Cause T T Cal Feb term 1934.
Feb.	5	"	Ent ord settg for trial 6/19/34. Ent oral waiver of jury trial.
May	8	"	Fld stip & ord that this cause now set for trial 6/19/34, may be contg for term.
Sept.	5	"	Ent Cause on T T Cal Sept term 1934.
"	11	"	Ent ord setting for trial 4/2/35.
Mar.	13	1935	Made report JS5.
"	29	"	Fld stip & ord waiving jury trial.
Apr.	2	"	Ent ord cont to 4/4/35 trial.
Apr.	4	1935	Ent proc trial Cases 5094 & 6287. Fld stip of facts. Fld 6 Plf Exhs. Ent ord memo be filed in 5 days & cases then stand submitted.
"	8	"	Fld separate pre-trial memo of each side.
June	6	"	Fld supplement to Plf brief.
Aug.	2	"	Fld Plfs brief. Fld Deft brief.

Dec. 31	"	Fld memo of concl & ent min ord thereon favor deft & direct findings & judg be prepared.
Mar. 2	1936	Ent ord allow & disallow cert proposed amends to defts prop findings.
" 5	"	Fld ord extend time for deft to file B/E to 5/15 & extend term.
" 10	"	Fld spec findings of fact & conclusions of law. Fld Dock & Ent Judg. Defts have costs. JBk 8/192. Made report JS6.
" 11	"	Fld defts cost bill & affid serv. Fld ord extending time for deft to file bill of exceptions to 6/8/36 & extending term.
" 14	"	Taxed costs in favor of deft $16.00. Dock & ent costs.
" 20	"	Fld J R—Closed.
June 2	"	Fld plfs pet for appeal. Fld ord allowg appeal. Fld assign of errors. Citation signed by Judge Hollzer ret. 7/2/36.
" 3	"	Fld prae of plf for rec on appeal. Fld not thereof. Fld citation served.
" 4	"	Fld cost bond on appeal.
" 19	"	Fld admis of serv of appeal papers.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

GARBUTT OIL COMPANY, a corporation, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	No. 5094-H COMPLAINT IN LAW For Recovery of Taxes Illegally Assessed and Collected.

Comes now the plaintiff above named, and for its cause of action against the defendant above named, alleges and says:

I

That plaintiff is now and was at all times herein mentioned, a corporation duly chartered, organized and existing under and by virtue of the laws of the State of California, having its office and principal place of business in the City of Los Angeles, in the Southern District of California, and was engaged in the business of producing oil and gas. That plaintiff has at all times borne true allegiance to the Government of the United States of America, and has not in any way aided, abetted or given encouragement to rebellion against the government, or at any time aided or abetted in any manner or given comfort to any sovereign or government that is or ever was at war with the United States.

II

That at all times herein mentioned the above named defendant was and is a sovereign body politic, by whom the taxes for which refund is here claimed were wrongfully through its agents collected.

III

That plaintiff seeks to recover from the United States of America the sum of $3,105.65, being the amount of overpayment by this plaintiff of its income and excess profits taxes for the calendar year ended December 31, 1919, which said sum was in excess of the tax legally due from said plaintiff and was illegally collected from said plaintiff by Rex B. Goodcell, then Collector of Internal Revenue for the Sixth District of California at Los Angeles, California; that said Rex B. Goodcell, by whom said overpayment of taxes was collected, as aforesaid, is no longer in office as Collector of Internal Revenue for said Sixth District of California at Los Angeles, California, having been succeeded in that office by Galen H. Welch, who is now the duly appointed and acting Collector of Internal Revenue for said Internal Revenue District.

IV

That under the provisions of the Act of Congress known as the Revenue Act of 1918, plaintiff prepared and on or about March 15, 1920, duly filed with the then acting Collector of Internal Revenue at Los Angeles, California an income and excess profits tax return of its net income and invested capital for its calendar year ended December 31, 1919; that said return disclosed a net income for said calendar year in the amount of $16,928.61 and an invested capital for said calendar year

in the amount of $133,842.38 and a total income and excess profits taxes for said calendar year in the amount of $2,072.68; that said taxes in the amount of $2,072.68 was duly paid to the then Collector of Internal Revenue at Los Angeles, California in installments during the year 1920 as permitted by law.

V

That after the filing of said income and profits tax return for the calendar year 1919 by said plaintiff corporation the Commissioner of Internal Revenue made an audit of said return and did adjust the net income as disclosed by said return by reducing the deduction taken on said return for depletion of plaintiff corporation's oil property; that the Commissioner's adjustment reduced the depletion deducted on the return in the amount of $14,788.17 to $11,024.75, a net reduction of $3,763.42, and correspondingly increased the net income as disclosed by said return in the amount of $16,928.61 by said adjustment of the depletion deduction of $3,763.42 and said Commissioner determined the correct taxable income of said plaintiff corporation for said calendar year 1919 to be $20,692.03; that the Commissioner of Internal Revenue then computed plaintiff corporation's excess profits tax for said calendar year 1919 under the provisions of Section 302 of the Revenue Act of 1918 and determined a total revised income and profits tax for which said plaintiff corporation was liable as its income and profits tax for said calendar year 1919 in the amount of $5,178.33; that against this revised tax of $5,178.33 the Commissioner of Internal Revenue allowed as a credit the amount of $2,072.68 paid by the plaintiff corporation as the tax shown on its return for said year, as aforesaid, and determined a deficiency

in tax against said plaintiff corporation for said calendar year 1919 in the amount of $3,105.65; the basis, as herein alleged, for the determination by said Commissioner of Internal Revenue of this deficiency in tax is disclosed in a letter from the office of the Commissioner of Internal Revenue addressed to the plaintiff corporation dated August 18, 1927, copy of which is hereto attached, marked EXHIBIT A and hereby made a part hereof; that said deficiency in income and excess profits taxes against plaintiff corporation for its calendar year ended December 31, 1919 in the amount of $3,105.65 was duly assessed against said plaintiff corporation and payment thereof was duly demanded of the plaintiff corporation by the then acting Collector of Internal Revenue under threat that unless said tax was paid within ten days from the date of said demand the collection of said tax would be enforced by distraint or other proceeding, and said deficiency in tax was thereupon duly paid by plaintiff corporation on, to wit, June 3, 1925, to Rex B. Goodcell, the then Collector of Internal Revenue at Los Angeles, California.

VI

That the plaintiff corporation was organized in 1907 with an authorized capital stock of $500,000.00 for the purpose of obtaining a lease for the development and production of oil and gas from certain oil properties; that said corporation did during the year 1907 acquire from Margarita Guirado Dallugge, Martin C. Marsh, Adolph Ramish, and Albert M. Stephens a certain twenty year lease dated October 3, 1907, of proven oil property described as a part of the Rancho La Brea, in the County of Los Angeles, State of California, and being a part of

that tract of land conveyed by Samuel R. Hancock to Bernardino Guirado and Albert M. Stephens, on the 28th day of December, 1899, by deed recorded in Book 1349, page 61 of Deeds, for the purpose of development and production of oil and gas therefrom; that in consideration for said lease, plaintiff corporation did issue to said Margarita Guirado Dallugge, Martin C. Marsh, Adolph Ramish, and Albert M. Stephens $250,000.00 par value of its capital stock; that at the time of the execution of said lease to the plaintiff corporation the plaintiff corporation contracted with the Union Oil Company, a corporation organized and existing under the laws of the State of California, whereby said Union Oil Company agreed to advance to plaintiff corporation all material, machinery and money necessary to bore and operate three wells upon said oil property and if such wells or any of them should produce oil in paying quantities said Union Oil Company agreed further to advance materials, machinery and money for any additional wells as might then be agreed upon, and said Union Oil Company further agreed to purchase from the plaintiff corporation at the wells all oil and gas produced from said wells, and in consideration for this agreement plaintiff corporation agreed that said Union Oil Company might be reimbursed for its expenditures out of plaintiff corporation's share of the first oil produced from said property and also agreed to issue $250,000.00 par value of its capital stock to said Union Oil Company, its nominee or assigns, and did in fact issue under date of February 25, 1908 said $250,000.00 par value of its capital stock to the nominee of said Union Oil Company in consideration of the contract aforesaid; that pursuant to said contract the said Union Oil Company did advance material, machinery and money for the

drilling of plaintiff corporation's oil wells, and did drill and complete the first of said wells during the year 1908 as commercially producing oil wells; that the fair market value of said lease of said oil property on the date of its acquisition was at least, to wit, $250,000.00; that the fair market value of said contract with said Union Oil Company at the time it was entered into and capital stock of the plaintiff corporation issued therefor was at least, to wit, $250,000.00.

VII

That in computing its net income subject to tax as disclosed on its income and profits tax return for said calendar year 1919, plaintiff corporation erroneously failed to claim as a deduction amortization of the cost of said Union Oil contract and the Commissioner of Internal Revenue in his adjustment of plaintiff corporation's net income for said year likewise erroneously failed and refused to allow a deduction in gross income for amortization of said cost of said Union Oil contract; that the amount of deduction to which plaintiff corporation is justly entitled as a deduction from its gross income for said calendar year 1919 as amortization of cost of said Union Oil contract is $12,500.00, being one-twentieth (1/20th) of the total cost of $250,000.00, which total cost plaintiff corporation is justly entitled to have returned to it by way of deduction as amortization proportionately each year over the twenty year life of said contract; that as a result of the failure and refusal of the said Commissioner of Internal Revenue to allow said amortization as a deduction from plaintiff's gross income for said calendar year 1919 in determining its net income for said taxable year, plaintiff corporation was compelled to overpay

its income and excess profits taxes for said year in at least the amount for which this suit is brought.

VIII

That in computing its invested capital as disclosed on its income and profits tax return for said calendar year 1919, plaintiff corporation erroneously failed to include as a part of its invested capital, the unamortized cost as of January 1, 1919 of the Union Oil contract, and the Commissioner of Internal Revenue in his adjustment of plaintiff corporation's return for said year 1919 likewise failed and refused to allow said unamortized cost of the Union Oil contract as part of plaintiff corporation's invested capital; that plaintiff corporation's invested capital for excess profits tax purposes for said year 1919 is, to wit, $167,010.26; that the Commission of Internal Revenue erred in refusing to allow said unamortized cost of the Union Oil contract as part of plaintiff corporation's invested capital, and the tax resulting therefrom was erroneously and illegally assessed against and collected from said plaintiff corporation.

IX

That on April 10, 1911 plaintiff corporation, by its Board of Directors, adopted the following resolution:

"BE IT RESOLVED that oil produced by this company since the 1st of January, 1911 shall be assigned to the lessors to the extent of their royalty and to the stockholders to the extent of their holdings of stock in the proportions to which they are severally entitled to receive it —in kind; so long as the stockholders severally pay calls of the superintendent and secretary for money necessary

to cover all expenses of the company, said calls for money to be paid by the 14th day of each month for the expenses of the current month; and if any stockholder shall fail to pay his proportion for said current expenses, then the right of such stockholder to receive such oil in kind shall cease and shall pass back to the company."

That said resolution was in full force and effect during the entire calendar year 1919; that pursuant to said resolution all the oil produced from plaintiff corporation's property during the calendar year 1919 was received in kind by the lessors and by the stockholders of said plaintiff corporation according to their proportionate interests, and during the entire calendar year 1919 all expenses of the company were paid from moneys received under calls or assessments from the stockholders; that during the entire calendar year 1919 plaintiff corporation made no sales of oil or gas produced from its property and received no income therefrom, nor did plaintiff corporation receive income from any other source; that on its income tax return for said calendar year 1919 plaintiff corporation erroneously treated the market value of the oil produced from its properties as its gross income and deducted therefrom the cost of production and other expenses in determining the net income subject to tax; that the Commissioner of Internal Revenue in making his determination of the gross income of the plaintiff corporation for said calendar year 1919 likewise included the market value of the oil produced from plaintiff corporation's property as its gross income; that in this respect the tax return of plaintiff corporation and the Commissioner's determination are in error; that in fact plaintiff corporation had no income of any nature during said calendar year 1919 and was not subject to tax in that year; that

by reason of said Commissioner's erroneous determination that the plaintiff corporation realized income during said calendar year 1919 and by reason of the erroneous assessment and collection of tax from plaintiff corporation for said year, plaintiff corporation overpaid its taxes for said year in at least the amount for which this suit is brought.

X

That after the payment by the plaintiff corporation of the deficiency in tax for the year 1919 in the amount of $3,105.65, as aforesaid, plaintiff corporation duly filed with the Collector of Internal Revenue for the Sixth District of California its claim for refund of $3,105.65 (or such greater amount as is legally refundable) for overpayment of taxes for its calendar year 1919 and alleged therein as ground for said claim that the Commissioner of Internal Revenue erred in failing to allow as a deduction from its gross income for said calendar year 1919 an amount of $12,500.00 as amortization of its cost of its contract with the Union Oil Company as hereinbefore alleged, and further, that the Commissioner of Internal Revenue erred in failing to include as part of the plaintiff corporation's invested capital for said calendar year 1919 the unamortized portion of said cost of said Union Oil contract; copy of said claim for refund is hereto attached, marked EXHIBIT B and hereby made a part hereof; that thereafter, under date of May 29, 1929 plaintiff corporation filed with the Commissioner of Internal Revenue a statement for the purpose of perfecting and completing said claim for refund hereinbefore referred to, said state-

ment bearing date of May 20, 1929, copy of which is hereto attached, marked EXHIBIT C and hereby made a part hereof, and in said statement plaintiff corporation notified said Commissioner of Internal Revenue that as further ground for its claim for the refund of taxes overpaid by it for said calendar year 1919 it alleges that the Commissioner of Internal Revenue erred in determining that plaintiff corporation realized any income for said calendar year 1919 for the reason that all the oil and gas produced by it was distributed in kind to its lessor and stockholders according to their proportionate interests and it had income from no other source, and that thereafter said Commissioner of Internal Revenue considered said claim for refund and said supplemental statement and did, under date of August 12, 1929, notify said plaintiff corporation that its contentions raised in said claim for refund and said supplemental statements could not be considered and that its claim for refund would therefore be rejected; copy of said letter of August 12, 1929, is hereto attached, marked EXHIBIT D and hereby made a part hereof; that thereafter the Commissioner of Internal Revenue did, under date of November 13, 1929, again notify plaintiff corporation that its claim for refund would be rejected; copy of said letter of November 13, 1929, is hereto attached, marked EXHIBIT E and hereby made a part hereof; that thereafter, under date of November 21, 1929, the Commissioner of Internal Revenue notified plaintiff corporation that its claim for refund for 1919 taxes in the amount of $3,105.65 had been rejected on a schedule

dated November 21, 1929; copy of said letter of November 21, 1929 is hereto attached, marked EXHIBIT F and hereby made a part hereof.

XI

Plaintiff corporation further alleges that no other action has been had on said claim here sued upon by Congress or by any department of the government or in any court, and that it is the sole and absolute owner of the claim herewith presented; that it has made no transfer or assignment of said claim or of any part thereof, and that plaintiff is justly entitled to the amount claimed herein from the United States after allowing all just credits and offsets.

WHEREFORE, plaintiff prays for judgment in its favor and against the United States of America for said sum of Three Thousand One Hundred Five Dollars and Sixty-five Cents ($3,105.65), together with interest from the 3rd day of June, 1925 at the rate of six per cent (6%) per annum as provided by law, and for its costs herein expended, and for such other and further relief as may to this Honorable Court seem just and proper in the premises.

Claude I. Parker
John B. Milliken
George H. Koster
Attorneys for Plaintiff

808 Bank of America Building
Los Angeles, California.

STATE OF CALIFORNIA)
(ss.
COUNTY OF LOS ANGELES)

John McPeak, being first duly sworn, deposes and says: that he is the Secretary of the GARBUTT OIL COMPANY, a corporation, the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

John McPeak

Subscribed and sworn to before me
this 20 day of November, 1931.

[Seal] Frances A. Gragg
Notary Public in and for the County
of Los Angeles, State of California.

EXHIBIT A

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue

Aug 18, 1927

and refer to
IT:CR:G-7
JWL

Garbutt Oil Company,
548 So. Spring Street,
Los Angeles, California.

Sirs:

In compliance with the request of your representative, Mr. Claude I. Parker, Washington, D. C., dated July 18, 1927, there is enclosed copy of schedules showing the basis of the additional assessment of $3,105.65 for the year 1919.

Respectfully,

C. R. NASH,
Assistant to the Commissioner.
By C. O. HEAP
Assistant Head of Division.

Enclosures:
Schedules.

—1—

Garbutt Oil Company. Year ended December 31, 1919.

Schedule 1

Net Income

Net income as disclosed by return	$16,928.61
As corrected	20,692.03
Additional income:	
(a) Excessive depletion	$ 3,763.42

Schedule 1(a)

Explanation of Item Changed

(a) Excessive depletion—

March 1, 1913 value of lease	$126,932.00
Estimated recoverable reserves	507,728 bbls.
Rate per bbl.	$ .25
Production for year	44,099
Depletion sustained	$ 11,024.75
Depletion taken	14,788.17
Excessive depletion	$ 3,763.42

In view of the fact that the profits tax as computed under Section 302 of the Revenue Act of 1918 is in excess of the tax as computed under Section 301 of the same Act, you have been given the benefit of the computation of tax under Section 302.

Schedule 2

Computation of Tax, 1919 Rates
Excess Profits Tax

Section 302			Tax
Net income for year		$20,692.03	
Less:			
Amount taxable @ 20%	$17,000.00		$3,400.00
Amount taxable @ 40%	692.03	20,692.03	276.81
Excess profits tax			$3,676.81

Income Tax

Net income taxable year		$20,692.03	
Less:			
Exemption	$2,000.00		
Excess profits tax	3,676.81	5,676.81	
Balance taxable @ 10%		$15,015.22	
Income tax			$1,501.52
Total income and profits tax			$5,178.33
Previously assessed			2,072.68
Additional to be assessed			$3,105.65

EXHIBIT B

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

Form 843—Jan., 1922 TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE Comptroller General U. S. January 18, 1922

CLAIM FOR

[ ]ABATEMENT OF TAX ASSESSED

[ ]CREDIT AGAINST OUTSTANDING ASSESSMENTS

[xxx]REFUND OF TAXES ILLEGALLY COLLECTED

[ ]REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

NOTICE TO COLLECTOR—Collector must indicate in block above the kind of claim, except in Income Tax cases.

IMPORTANT—File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

COLLECTOR'S NOTATION

District Account number Date received

[ ]

Stamp here

.....

Collector of Internal Revenue

Date received by Administrative Unit

[ ]

Stamp here

State of CALIFORNIA)
) ss:
County of LOS ANGELES)

[Type or Print] GARBUTT OIL COMPANY

(Name of taxpayer or purchaser of stamps.)

UNION OIL BUILDING

(Residence—give street and number as well as city or town and State.)

LOS ANGELES, CALIFORNIA

(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged — Period — Year
   Production of Oil — From: Jan. 1st 1919
   To: Dec. 31st 1919
2. Character of assessment or tax.....
   .....
   (State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased .....$ 5,178.33
4. Reduction of Tax Liability requested (Income and Profits Tax).....$ 3,105.65
5. Amount to be abated.....$.....

6. Amount to be refunded (or such greater amount as is legally refundable)....$ 3,105.65

7. Dates of payment (see Collector's receipts or indorsements of canceled checks).....

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed Sixth California.....

9. District in which unpaid assessment appears.....

10. Amount of overpayment claimed as credit $.....

11. Unpaid assessment against which credit is asked; period from.....to.....$.....

Deponent verily believes that this application should be allowed for the following reasons:

The amount set out on line three above represents income and profits tax assessed against claimant for the calendar year 1919 and made up as follows:

Assessed on original return	$ 2,072.68
Additional assessed on basis of Commissioner's audit	3,105.65
	$ 5,178.33

The tax assessed on the original return was paid within the year 1920 and the additional tax was paid with check drawn in favor of the Collector of Internal Revenue at Los Angeles, California, dated March 31, 1925. It is now contended that the whole amount of additional tax paid should be refunded for the reasons set out below.

According to information given by the Commissioner in his letter addressed to claimant corporation under date of August 18, 1927 the additional tax liability was determined as follows:

"Net income as disclosed by return	$ 16,928.61
As corrected	20,692.03
Additional income:	
(a) Excessive depletion	$ 3,763.42

Explanation of Item changed

(a) Excessive depletion—	
March 1, 1913 value of lease	$126,932.00
Estimated recoverable reserves	507,728 bbls.
Rate per bbl.	$ .25
Production for year	44,099
Depletion sustained	$ 11,024.75
Depletion taken	14,788.17
Excessive depletion	3,763.42

In view of the fact that the profits tax as computed under Section 302 of the Revenue Act of 1918 is in excess of the tax as computed under Section 301 of the same Act, you have been given the benefit of the computation of tax under Section 302.

Computation of Tax, 1919 Rates

Excess Profits Tax

Section 302			Tax
Net income for year		$20,692.03	
Less:			
Amount taxable @ 20%	$17,000.00		$3,400.00
Amount taxable @ 40%	692.03	20,692.03	276.81
Excess profits tax			$3,676.81

Income Tax

Net income taxable year		$20,692.03	
Less:			
Exemption	$ 2,000.00		
Excess profits tax	3,676.81	5,676.81	
Balance taxable @ 10%		$15,015.22	
Income tax			$1,501.52
Total income and profits tax			$5,178.33
Previously assessed			2,072.68
Additional to be assessed			$3,105.65"

Exception is taken to the Commissioner's determination of taxable net income and to his computation of the excess profits tax under Section 302 of the Revenue Act of 1918 rather than under the provisions of Section 301 based on allowable invested capital.

As to the determination of net income it is contended that said net income was overstated to the extent of $12,500.00, by reason of the following:

This corporation was organized during the latter part of the year 1907 with an authorized capital stock of $500,000.00. Under contract dated November 3, 1907, it was provided that on the organization of the corporation one-half of its authorized capital stock should be issued fully paid up to the then owners of an oil lease and one-half of said authorized capital stock should be issued to the Union Oil Company of California. The consideration in the first instance being the transfer of the lease to the corporation and in the second instance an agreement on the part of the Union Oil Company of California to provide the expenses of developing the property for which it was to be reimbursed only out of any oil which might be produced.

Although the agreement referred to provided that an equal amount of the Company's capital stock should be set up for the lease and contract, viz.: $250,000.00 of par value, said assets were taken up on the books as follows:

Contract with Union Oil Company	$250,000.00
Lease	187,500.00
Stock Discount	62,500.00
Total—	$500,000.00

However, the Commissioner has apparently conceded that the lease cost claimant corporation $250,000.00. In this connection reference is made to letter addressed to claimant corporation by the Commissioner relative to the determination of its tax liability for the year 1918, said

letter being dated February 3, 1925, IT:CR:G-2-MPS. In said letter the adjustments with respect to invested capital are set forth as follows:

"Invested capital as disclosed by return		$391,551.54
As corrected		28,364.50
Deductions		$363,187.04
Deductions:		
(a) Stock discount disallowed	$ 43,750.00	
(b) Contract with Union Oil Company disallowed	250,000.00	
(c) Value of lease decreased	69,347.79	
(d) 1917 taxes prorated	89.25	
Total deductions		$363,187.04

(a) Stock discount disallowed $43,750.00

Discount on the sale of capital stock is not allowable as invested capital.

(b) Contract with Union Oil Company disallowed $250,000.00

Inasmuch as this contract had no value as at January 1, 1918, it is not allowable for invested capital purposes.

(c) Value of lease decreased $69,347.79

Value as shown on return	$133,093.54
Value as corrected based on cost less Depletion	63,745.75
Decrease	$ 69,347.79

(d) 1917 taxes prorated $89.25

The tax due for 1917 in the amount of $162.87 is prorated from invested capital for 200 days as follows: $162.87 multiplied by 200/365 equals—$89.25."

From the foregoing it is appa_rent that an undepleted cost of $63,745.75 for the lease has been determined as of January 1, 1918. Based on the assumption that the Commissioner has allowed $250,000.00 as the original cost of the lease when acquired by the corporation in 1907, and since an equal amount of capital stock was issued to the Union Oil Company of California for entering into the contract, it is concluded that the same cost should be assigned for the contract as was allowed for the lease. It is submitted that the said contract was valuable to claimant corporation throughout the entire life of the lease and that it was in error in writing same off its books during the year 1918.

Had it not been for the contract whereby the Union Oil Company of California agreed to develop the property and take a chance of securing reimbursement for the cost of such development, if, and when, oil was produced from the property, it might not have been possible for claimant corporation to have provided funds for the development of its property, thereby enabling it to realize an income from said property during the life of the lease. It is therefore contended that whatever cost is assigned to the contract should be ratably spread over the period of the lease. On this basis the cost of said contract

should be amortized over a twenty-year period and one-twentieth (1/20) thereof should be allowable as a deduction for each year of said period. By using a cost for the contract of $250,000.00, the allowance for amortization applicable to the year 1919 would be $12,500.00. It is therefore submitted that the net income determined by the Commissioner for the year 1919 should be reduced to the extent of $12,500.00, thereby making a revised net income of $8,192.03.

The invested capital as shown on the return filed by claimant for the year 1919 was $133,842.38. In the balance sheet as of January 1, 1919, attached to said return, the lease was shown at $118,305.37. No cost is shown on said balance sheet for the contract with the Union Oil Company of California, neither is the stock discount of $43,750.00 shown as an asset. Therefore, in order to bring the invested capital for the year 1919 to the same basis as was determined by the Commissioner for the year 1918, the following adjustments should be made:

As an unreturned cost was determined for the lease by the Commissioner as of January 1, 1918 of $63,745.75, and a depletion was allowed for said year of $10,647.50, the unreturned cost for the lease as of January 1, 1919 would be $53,098.25, as compared to the $118,305.37 shown by the company's balance sheet as of January 1, 1919, so that a reduction in the invested capital as claimed on this account should be $65,207.12.

Since the unamortized cost of the contract with the Union Oil Company is not reflected in the invested capital

as claimed by the corporation, it is submitted that in line with the above contentions the original cost of said contract less accumulated amortization down to January 1, 1919 should be included as a part of the company's invested capital for the year 1919. The addition to invested capital on account of this contract would be determined as follows:

Original cost of contract	$250,000.00
Less amount returnable through amortization October 3, 1907 to December 31, 1918 (11 years and 3 months)	140,625.00
Unreturned cost	$109,375.00

On the basis of the foregoing a revised invested capital would be arrived at as follows:

Amount claimed on the return	$133,842.38
Less excessive cost of lease eliminated	65,207.12
Difference	$ 57,635.26
Plus unreturned cost of contract, as above	109,375.00
Revised invested capital	$167,010.26

Excess Profits Credit:

8% of $167,010.26	$ 13,360.82
Special exemption	3,000.00
Total credit	$ 16,360.82

Since the total credit exceeds the revised income of $8,192.03, as above set out, no profits tax liability would be due. The income tax would then be shown as follows:

Net income as revised	$8,192.03	
Less exemption	2,000.00	
Balance taxable at 10%	$6,192.03	$ 619.20
Amount paid		5,178.33
Amount overpaid		$4,559.13

In view of the foregoing, it is submitted that this corporation should have returned to it the full amount of additional tax paid within the four years preceding the filing of this claim, viz., $3,105.65, with interest computed thereon in accordance with the provisions of existing law.

(Attach additional sheets if necessary.)

Signed:

GARBUTT OIL CO.

By FRANK GARBUTT

Sworn to and subscribed before me this 29 day of March, 1929

Martha M. Fahey

Notary Public in and for the County of Los Angeles, State of California.

(Title.)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

EXHIBIT C

STATEMENT OF GARBUTT OIL COMPANY LOS ANGELES, CALIFORNIA FOR THE PURPOSE OF PERFECTING AND COMPLETING CLAIM FOR REFUND COVERING ALLEGED OVERPAYMENT OF INCOME TAX FOR THE CALENDAR YEAR 1919

Los Angeles, California
May 20, 1929

Hon. David H. Blair
Commissioner Internal Revenue
Washington, D. C.

Sir:

Reference is made to claim for refund in the amount of $3,105.65, filed by Garbutt Oil Company with principal place of business at Union Oil Building, Los Angeles, California, with the Collector for the Sixth District of California on or about March 29, 1929, covering overpayment of income tax alleged to have been made for the calendar year 1919. The claim was based upon the grounds that—

(a) The net income of the corporation was overstated to the extent of $12,500.00, because of the Commissioner's failure to allow a deduction for the amortization of the value of a certain contract entered into with the Union Oil Company of California, for which capital stock was issued having a par value of $250,000.00; and

(b) That the invested capital as determined by the Commissioner was overstated by reason of the Commissioner's failure to include therein any portion of the cost to the company of the above mentioned contract entered into with the Union Oil Company of California.

It now develops that a further reason exists in support of said claim for refund which is as follows:

Commencing with the year 1911 the arrangement entered into between the Garbutt Oil Company and the Union Oil Company of California, which owned 50% of said stock, was to the effect that the stockholders were to pay in to the company a sufficient amount to cover the operating expenses and they were to receive the oil produced by the company and sell it themselves. Under this arrangement the company received none of the proceeds derived from the sale of the oil, although it appears for bookkeeping purposes the oil was considered distributed to the stockholders at its market value when distributed and the difference between the expense of operation and the market value of the oil when distributed was accounted for as income to the Government.

As a matter of fact, the Garbutt Oil Company distributed assets in kind to its stockholders and they were entitled to treat the property so received as a dividend, which under the income tax law and regulations they should have accounted for at the market value of the property, in this case consisting of crude oil at its market value when received.

In this connection attention is called to statement appearing in recent letter from the Commissioner's office addressed to the Union Oil Company of California, setting forth the final adjustments made in its income and profits

tax liability for the year 1918 and subsequent years. The particular statement in the Commissioner's letter to which attention is directed appears under Schedule 1-A, and is as follows:

"The Union Oil Company owning 50% of the stock of the Garbutt Oil Company received from it each year one-half of the oil produced and paid one-half of its expenses. As the Garbutt Oil Company is a domestic corporation subject to tax on its net income the value of the oil received by the Union Oil Company in excess of expenses paid is here treated as a dividend received."

In addition to the foregoing, it is further submitted that the Internal Revenue Bureau heretofore consistently has recognized the fact that under the Revenue Acts in force prior to the Revenue Act of 1928, a corporation realizes neither profit nor loss in the distribution of its assets to its stockholders.

By eliminating the fictitious gross profits or appreciation taken up on the return of the Garbutt Oil Company for the year 1919, arising from the distribution of the oil produced in the manner hereinbefore explained, no taxable profit results, and it therefore follows that even though the specific grounds set forth in the claim for refund are denied said claim should, nevertheless, be allowed in full for the reasons herein set forth.

It is therefore respectfully urged that the amount by which the Garbutt Oil Company has overpaid its correct tax liability for the year 1919, viz., $5,178.33, or so much

thereof as is properly refundable within the statute of limitations, be refunded together with interest computed thereon as provided by existing law.

Respectfully submitted,

GARBUTT OIL COMPANY
By MOYE W. STEPHENS

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

MOYE W. STEPHENS of the City of Los Angeles, State and County aforesaid, being first duly sworn, deposes and says that he is Treasurer of the Garbutt Oil Company, a corporation with principal place of business at Los Angeles, California; that the foregoing statement is true and correct to the best of his knowledge and belief and that the same has been prepared for the purpose of perfecting and completing that certain claim for refund heretofore filed on behalf of said company for the taxable year 1919, and is to be considered as a part and parcel of said claim.

MOYE W. STEPHENS

Subscribed and sworn to before me this 23rd day of May, 1929.

FLORENA M. SAMPSELL
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT D

TREASURY DEPARTMENT
Washington

IT:AR:C-5
CAB

Aug. 12, 1929

Garbutt Oil Company,
Union Oil Building,
Los Angeles, California

Sirs:

Your claim for refund of $3,105.65 for the taxable year 1919 has been examined and will be rejected for the following reasons:

You contend that $250,000.00 capital stock issued to the Union Oil Company of California upon condition of its agreement to finance the development expenses represents the cost of a contract which is returnable through amortization over a period of twenty years from October 3, 1907.

In Paragraph 3 on Page 2 of your claim you state:

"Under contract dated November 3, 1907 it was provided that on the organization of the corporation one-half of its authorized capital stock should be issued fully paid up to the then owners of oil lease and one-half of said authorized capital stock should be issued to the Union Oil Company of California; the consideration in the first instance being the transfer of the lease to the corporation and in the second instance an agreement on the part of the Union Oil Company of California to provide the expenses of developing the property for which it was to

be reimbursed only out of any oil which might be produced."

Inasmuch as the $250,000.00 stock was exchanged with the Union Oil Company of California for a drilling contract the expenses of which were to be reimbursed to the Union Oil Company of California out of oil receipts, it is held that the taxpayer received financial assistance which had no value for depletion, amortization or invested capital purposes. The allowance of such an item would result in a double deduction of the cost of development.

You further contend that inasmuch as the taxpayer entered into an agreement with its stockholders in 1911 for said stockholders to pay into the company sufficient funds to pay the expenses and the company was to turn over to the stockholders all the oil produced for them to sell, that the Garbutt Oil Company distributed to its stockholders assets in kind and that no taxable profit accrued to the taxpayer.

This office holds that the distribution of the oil in excess of the expenses contributed represents a distribution of profits which are taxable to the corporation.

If you do not acquiesce in the proposed action relative to your claim and desire a hearing in the Unit at Washington, such hearing will be granted if written request is made therefor within twenty days from the date of this letter.

If a hearing is not requested the rejection of this claim will be officially scheduled at the expiration of the period indicated.

Respectfully,

DAVID BURNET—Deputy Com.

(By) H. B. Robinson, Head of Division.

EXHIBIT E

TREASURY DEPARTMENT

Washington

IT:AR:C-5 Nov. 13, 1929
CAB

Garbutt Oil Company,
Union Oil Building,
Los Angeles, California.

Sirs:

Your claim for refund of $3,105.65 for the taxable year 1919 has been examined in connection with the report on the conference held in this office on October 4, 1929, and will be rejected for the following reasons:

The claim is based on the ground that the $250,000.00 capital stock issued to the Union Oil Company of California upon the condition of its agreement to finance the development expenses represents the cost of a contract which is returnable through amortization over a period of twenty years from October 3, 1907, and that the unamortized portion of such contract should be included in invested capital.

It is held that the contract had no value to the corporation, inasmuch as it carried the agreement that if the

development resulted in the production of oil the money expended by the Union Oil Company of California was to be repaid out of any profit accruing to the corporation from such production. If no oil were produced no liability existed for the corporation to pay back the amount advanced. It therefore appears that the contract in case oil was produced became a liability of the corporation rather than an asset.

Your contention that the Garbutt Oil Company distributed assets in kind to its stockholders, and therefore no income accrued to the corporation was first raised in your brief dated May 20, 1929.

Under Treasury Decision 4266, Cumulative Bulletin VIII-1, Page 111, a refund or credit of any internal revenue tax will not be allowed in any case after the expiration of the statutory period of limitations applicable to the filing of the claim therefor, unless prior to the expiration of such period a formal claim has been duly filed which complies with all the requirements of the regulations applicable at the time such claim was filed.

Where, however, an informal claim has been filed prior to the expiration of such statutory period of limitations a refund or credit may be allowed after the expiration of such statutory period of limitations in any case in which such informal claim is perfected by the filing of a formal claim prior to May 1, 1929.

Under this Treasury Decision it follows that when the statutory period extends beyond May 1, 1929, an informal

claim may be perfected only by the filing of a proper claim within the statutory period of limitations. The tax sought to be refunded in the present case was paid on April 3, 1925 and the period of limitations expired on April 3, 1929. While the original claim was filed within the statutory period that claim made no reference to this contention and the supplemental brief in which the new contention was raised was filed after April 3, 1929 and after May 1, 1929, and cannot, therefore, be regarded as referring back to and becoming a part of the formal claim filed.

The rejection of your claim will officially appear on a schedule to be approved by the Commissioner.

Respectfully,

DAVID BURNET, Deputy Commissioner.

By H. B. ROBINSON

Head of Division.

EXHIBIT F

TREASURY DEPARTMENT
Washington

November 21, 1929

Office of
Commissioner of Internal Revenue

IT:C:CC—

Garbutt Oil Company,
Union Oil Building,
Los Angeles, California

In Re: Refund Claim for year 1919
Amount $3,105.65

Sirs:

Your claim for refund of taxes, above referred to, was disallowed by the Commissioner on a schedule dated November 21, 1929.

Respectfully,

DAVID BURNET,
Deputy Commissioner
By Charles O. Suman
Head of Division

[Endorsed]: Filed Nov. 20, 1931 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ANSWER TO COMPLAINT

Comes now the defendant, The United States of America, through its attorneys Samuel W. McNabb, United States District Attorney for the Southern District of California, Ignatius F. Parker and Alva C. Baird, Assistant United States Attorneys for said District and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and in answer to Complaint of the Plaintiff on file herein admits, denies and alleges as follows:

I

The defendant admits the allegations of paragraph I of the Complaint.

II

The defendant admits the allegations of paragraph II of the Complaint except that it is specifically denied that the taxes mentioned in said paragraph were wrongfully collected

III

The defendant admits the allegations of paragraph III of the Complaint except that it is denied that there was an overpayment of taxes in any sum whatsoever or that the amount paid was in excess of the tax legally due or that any part of said tax was illegally or unlawfully collected.

IV

The defendant admits the allegations of Paragraph IV of Complaint.

V.

The defendant admits the allegations of paragraph V except that it denies that the payment of the deficiency

in tax was made by the plaintiff on June 3, 1925, and alleges instead that said payment was made on April 3, 1925.

VI.

The defendant denies the allegations of paragraph VI of the complaint on the ground that it has not sufficient knowledge or information upon which to form a belief as to the truth or falsity thereof.

VII.

The defendant denies the allegations of paragraphs VII, VIII, and IX of the complaint.

VIII.

The defendant answering paragraph X of plaintiff's complaint admits that the plaintiff filed a claim for refund with the Collector of Internal Revenue for the Sixth District of California on March 30, 1929; that the plaintiff filed the statement, a copy of which is attached to its complaint and marked Exhibit "C" on May 31, 1929, which date was more than four years after the date of the payment of the tax and that the period of limitation for filing a claim for refund had expired when said statement was filed and no proper claim referring to the grounds raised in said statement had been filed within the statutory period of limitation, or prior to May 1, 1929, and that said statement was without legal effect; that the Commissioner of Internal Revenue did, on November 13, 1929, notify the plaintiff corporation of the matters and things set forth in Exhibit "E" of the complaint, and further it is admitted that the claim for refund was disallowed in schedule dated November 21, 1929, and that Exhibit "F" of plaintiff's complaint is a copy of the

letter bearing date of November 21, 1929; that the defendant denies all of the allegations of said paragraph X not herein expressly admitted or denied.

IX

The defendant admits the allegations of paragraph XI of Plaintiff's Complaint except that it is denied that the Plaintiff is entitled to the amount claimed or any other sum whatsoever.

WHEREFORE defendant having fully answered the Plaintiff's Complaint prays that the Plaintiff take nothing by this action and that the defendant be permitted to go hence with its costs.

Samuel W. McNabb
SAMUEL W. McNABB
United States Attorney

Ignatius F. Parker
IGNATIUS F. PARKER
Assistant United States Attorney

Alva C. Baird
ALVA C. BAIRD
Assistant United States Attorney

Eugene Harpole
EUGENE HARPOLE
Special Attorney
Bureau of Internal Revenue

[Endorsed]: Received copy this 23rd day of Mar. 1932. Claude I. Parker, P. A. A. Attorneys for plaintiff. Filed Mar. 23, 1932, R. S. Zimmerman Clerk, By Theodore Hocke, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

WAIVER OF JURY TRIAL

IT IS HEREBY STIPULATED AND AGREED between the parties to this cause that a jury trial is waived and that the cause be submitted to the Court for decision without the aid or intervention of a jury.

Dated at Los Angeles, California, this 27th day of March, 1935.

Claude I. Parker
George H. Koster
Bayley Kohlmeier
Attorneys for Plaintiff

Peirson M. Hall—E. H.
U. S. Attorney

Eugene Harpole
Attorneys for defendant

It is so ordered. Mar 27 1935

Hollzer
Judge

[Endorsed]: Filed Mar. 29, 1935, R. S. Zimmerman, Clerk. By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION OF FACTS

In addition to the facts submitted by the pleadings, the parties hereto, through their respective counsel, hereby stipulate and agree that the following facts are true:

I.

That no other action has been had on the claims sued upon in the above entitled suits, in Congress or any department of the Government, or any Court; that plaintiff is the sole owner of said claims here sued upon; that plaintiff has made no transfer or assignment of said claims or any part or parts thereof.

II.

That plaintiff has at all times borne true allegiance to the Government of the United States of America and has not in any way aided or abetted or given encouragement to rebellion against the Government or at any time aided or abetted in any manner or given comfort to any sovereign or government that is or ever was at war with the United States.

III.

That on April 3, 1925 the plaintiff duly paid to the then Collector of Internal Revenue at Los Angeles, California a tax deficiency in the amount of $3,105.65 which had

been assessed against this plaintiff as an additional tax for the calendar year 1919, as alleged in Paragraph V. of the complaint filed in case No. 5094-H.

IV.

That after the payment by the plaintiff corporation of the deficiency in tax for the year 1919 in the amount of $3,105.65, as aforesaid, the plaintiff corporation did, on March 30, 1929, file with the Collector of Internal Revenue at Los Angeles, California, its claim for refund of $3,105.65 of its taxes for the calendar year 1919. A true and correct copy of said claim for refund is attached to the plaintiff's complaint in case No. 5094-H and marked Exhibit B.

V.

That under date of August 12, 1929, the Deputy Commissioner of Internal Revenue addressed a letter to the plaintiff, a true copy of which letter is attached to the plaintiff's complaint in case No. 5094-H and marked Exhibit D.

VI.

That under date of November 13, 1929 the Deputy Commissioner of Internal Revenue gave notice of intention to reject the plaintiff's claim for refund. A true copy of the letter of the intention to reject is attached to plaintiff's complaint in case No. 5094-H and marked Exhibit E.

VII.

That under date of November 21, 1929 the Deputy Commissioner of Internal Revenue notified the plaintiff

by letter that its refund claim was rejected. A true copy of said letter of November 21, 1929 is attached to plaintiff's complaint in case No. 5094-H and marked Exhibit F.

VIII.

That the plaintiff corporation was incorporated under the laws of the State of California in 1907. On October 3, 1907 it, as lessee, executed a lease of certain oil property. (A true copy of said lease is hereto attached, marked Exhibit 1, and hereby made a part hereof). Oil was discovered on this property and the only business engaged in by the plaintiff during the years involved in these proceedings was in connection with the production and disposition of oil produced from this property.

IX.

That on April 10, 1911 the Board of Directors of the plaintiff corporation adopted a resolution, a true and correct copy of which is hereto attached, and marked Exhibit 2, and hereby made a part hereof.

X.

That on its books and income tax returns the plaintiff corporation adopted a system of recording the oil produced at its market value and treated the difference between that value and the cost of producing the oil as income. The Commissioner of Internal Revenue likewise adopted this method and treated the income so computed as taxable income.

It is further agreed that either party may introduce other evidence not inconsistent with the facts herein stipulated.

Claude I. Parker
George H. Koster
Bayley Kohlmeier
Attorneys for Plaintiff.

Peirson M. Hall—E. H.
United States Attorney.

Ernest R. Utley—E. H.
Assistant U. S. Attorney

Eugene Harpole
Attorneys for Defendant.

DATED: April 1935.

EXHIBIT 1

THIS LEASE, Made and entered into this 3rd day of October, 1907, between MARGARITA GUIRADO DALLUGGE, MARTIN C. MARSH, ADOLPH RAMISH, and ALBERT M. STEPHENS, herein denominated Lessors, and the "Garbutt Oil Company, a corporation duly organized and existing under the laws of the state of California, herein denominated the Lessee WITNESSETH:

I.

That for and in consideration of the sum of One Dollars lawful money of the United States, paid by the Lessee to the Lessors, and other good and valuable considerations, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements herein contained, the Lessors have leased, let and demised, and do hereby lease, let and demise unto the Lessee, and the Lessee hereby takes and accepts from the said Lessors, for the period of ten years from this date, the sole and exclusive right and privilege of drilling, operating for and developing by means of bored wells, liquid petroleum, oil and gas only, in and upon and from the lands hereinafter described.

II.

The term "liquid petroleum" hereinbefore used, is defined to be that petroleum product which can be obtained by boring wells and which can be removed by pumps through and by means of bored wells, and this lease shall

not be construed as giving to the Lessee the right or privilege of taking such or any product by any other means than by bored wells.

III.

The Lessors also give to the Lessee the right to remove said substances from the said land, and the right to use so much of the surface as may be necessary for that purpose. Also the right of entry upon the premises hereinafter described for such purposes, and the right of way for necessary pipe lines for removing such oil as may be discovered upon said premises, and for carrying water to be used about said wells, and also the privilege of erecting such telephone lines as may be

necessary for carrying on said business. Any pipe lines which shall be located upon said premises shall be laid in trenches of a uniform depth of not less than eighteen (18) inches, except such lead lines as do not interfere with the cultivation of the soil. Lessee to be liable for any damage to land caused by bursting or breaking of pipes. Sump holes to be constructed in a substantial manner.

The lessee in exercising the rights granted by this clause of the lease, agrees that it will so exercise the same as to cause the least possible interference with the cultivation of the soil upon the premises by the Lessors and their tenants.

IV.

Lessee agrees that it will forthwith, with diligence and despatch, commence operations with two rigs, for drilling on said premises, and that it will with diligence and despatch, inevitable delays excepted, prosecute the drilling of two wells to a depth of 2,000 feet in each well, unless oil shall be discovered in paying quantities at a less depth than 2,000 feet.

V.

Should the Lessee succeed in obtaining oil in paying quantities in either of said two wells hereinbefore agreed to be bored, then and in that event it agrees that it will continue boring wells with at least two outfits upon said premises, and will proceed diligently and continuously operating both of said outfits in boring wells, until at least one producing well has been obtained upon every five acres of oil producing land upon said premises.

VI

It is hereby agreed and understood by the parties hereto that in case the said Lessee fails to obtain oil in paying quantities in any well or wells to be drilled as hereinbefore agreed, ~~witoin the said period of three years,~~ it will then execute a cancellation and surrender of this lease, duly acknowledge and deliver the same to the Lessors.

VII.

At the expiration of three (3) years from the abandonment or

successful completion of the first well, the Lessee will release and quitclaim from the effect of this lease, all the leased premises except such portion thereof as shall have been by actual operations at that time demonstrated to be oil producing in paying quantities, and thereafter the Lessee shall not have the privilege of boring any further wells upon the said premises, except upon that portion thereof so demonstrated to be oil producing land.

VIII.

It is hereby agreed and understood that at the expiration of this lease, or the cessation of the right to drill, as herein defined, all wells that are then producing oil may be retained and operated by the Lessee for a further period not exceeding ten (10) years, on the same terms as to royalty, and all other conditions herein specified, and that all the rights for water, rights of way, pipe lines for oil and telephone lines herein specified as may be necessary to operate said wells and conduct such business, may be retained and operated so long as such wells continue in paying quantities, not exceeding said additional period of ten years. And the Lessee shall have the right to do such acts and things as may be necessary to keep said wells in productive condition, including the right to ream, clean out, deepen, or re-drill, within a radius of 25 feet of any producing well, to maintain or increase production.

IX.

And while said Lessee operates said well or wells under the terms of this lease, after having surrendered a part

of the premises, the Lessors will not drill, or permit others to drill or operate for oil within the demised premises, nearer than two hundred fifty (250) feet of any well so operated. And it is further understood and agreed that after the expiration of the first period of ten (10) years, the right to operate any wells shall cease absolutely so soon as the said wells shall fail to produce oil in paying quantities.

(3)

X.

If at any time during the operation of this lease, after boring three wells, it shall result that it is unprofitable to bore any more wells upon the said property, party of the second part herein shall have the privilege of releasing to the Lessors all of the said leased premises, except such parts thereof as are occupied by producing and profitable wells, and thereupon this lease shall be terminated and annulled except as to such wells as may then be operating under this lease.

XI.

The Lessee further agrees to continuously operate and pump all wells in which oil may be developed, and to use only so much of said land as may be necessary for the purposes of this lease; to allow the Lessors, their agents or attorneys, the right to inspect the said tanks, wells, the books of said Lessee, and all records as to the production of oil from said territory, at any time during the term of this lease; to render monthly statements of

the production of oil, other than oil used for fuel on said premises in the operation of its plants, to the said Lessors on or before the 15th day of every calendar month on and after the completion of the first oil well; to deliver to the Lessors at the tanks upon the premises—said tanks to be erected by the Lessee—the gross one-sixth (1/6) part of all the oil they may produce and save from said land; or, the Lessors agreeing thereto, the whole production of said oil wells may from time to time be shipped to market and sold by the Lessee with its product, for and on account of the Lessors and the Lessee, in which event the Lessee agrees to pay the Lessors for their royalty on the 15th day of each month for the oil sold during the preceding calendar month. It is provided, however, that before paying the royalty to the Lessors, there shall be deducted from the total production that quantity of oil which shall be required and actually used for fuel pur-

(4)

poses in said mining and drilling operations.

XII.

It is further provided that if the Lessee shall lay any conduit for the purpose of conducting oil from the said wells on said premises, or over said premises, then the Lessee will carry in such conduits the proportion of the oil belonging to the Lessors, whether they take it in kind or whether it be sold together with the oil of Lessee, without cost or charge for such transportation; and if the Lessee shall become interested, directly or indirectly, in the construction of any conduits for the purpose of taking oil or gas from the said premises, and from the said well or other wells in the said neighborhood, then

the Lessee will conduct or cause to be conducted the portion of oil belonging to the Lessors, whether they take it in kind, or whether the same be sold with that of the Lessee, and will deliver the same at the output of such conduit to the Lessors in suitable receptacle, on the same terms and conditions as are charged to and imposed upon the oil of the Lessee.

XIII.

The Lessors shall have the privilege of changing from time to time the method of taking in the manner hereinbefore specified, said royalty, and said change shall be made, if the same is desired, *to* as to take effect on the first of each calendar year, and the method thus determined by the Lessors shall continue during the calendar year—such change of method to be indicated in writing by the Lessors to the Lessee.

It is provided, however, that for a period of two years from this date, the Lessors will not take their royalty in kind, but the same shall be disposed of by the Lessee with its own oil, and the

Lessee agrees that during the period of time aforesaid, it will pay to the Lessors for all royalties to which they are entitled under this lease, the price at which the oil may be sold by the Lessee to the Union Oil Co. for such period, but the Lessee guarantees that such price shall at no time during the said period be less than 50¢ per barrel net to the Lessors, at the wells.

XIV.

It is agreed and understood that the Lessee shall have the right to use such water as may be required for the

purpose and use of drilling and pumping, or other operations on the premises.

It is also agreed and understood that excepting for such purposes, all water now developed or hereafter to be developed, upon said premises, shall be and become the property of the said Lessors, and in the event of the abandonment of any or all wells, the Lessors shall have the full and free use of all water flowing therefrom, except so much as Lessee may use for its said operations on the leased premises.

It is also agreed and understood that nothing herein contained shall prevent the use and occupation of said lands by the said Lessors or their assigns in any part or parts of said land (or their tenants) for agricultural and stock raising purposes, or residences or houses, provided that such occupation and use shall not interfere with the possession of said Lessee for the purposes of drilling and operating as hereinbefore and hereinafter set forth.

Lessors reserve the right to grant rights of way to railroads across said property, and also, after the expiration of three years, reserve the right to lay out streets across the same, and to subdivide the whole or any portion of said property.

It is understood, however, that any streets, railroads, buildings or improvements to be hereafter erected or constructed upon said premises, shall not trespass upon or interfere with the use or operation of any wells which may have been bored under this lease; and it is further

understood that after any railroads, houses or building improvements may be placed upon said premises, the Lessee will not bore any well nearer than fifty (50) feet to such improvements, houses or railroads.

XV.

Under this agreement a well shall be deemed a producing well in paying quantities whenever the same will produce, being diligently pumped, five barrels per day.

XVI.

Should it result in the boring of said wells that the oil to be pumped therefrom is of greater value than the gas flowing therefrom, if any such does flow, then and in that event, all of the gas produced by any such wells shall belong to the Lessors as part consideration for the lease of the said premises, and in that event, the Lessors will have access to said wells, if they so desire, for the purpose of collecting the gas emanating from said well or wells, with the right to conduct the same therefrom in any direction or directions as they may see fit, by pipes.

XVII.

Should, however, any of said wells so bored at the time of their several completion prove more valuable as a gas well than as an oil well, and if the same be operated for the production of gas, then the lessee is to have and receive two-thirds (2/3) of such gas, together with its due proportion of the oil, and the Lessors shall have one-third (1/3) of the gas, together with their due proportion of oil.

XVIII.

Should it be determined upon the completion of any of said wells that the same are unprofitable for oil or gas,

the Lessee shall have the privilege, within ninety (90) days, of drawing the pipes and removing all machinery and fixtures placed thereon by them, and also shall at the expiration of the lease, they having fully performed the conditions and obligations imposed upon them herein,—have the same privilege of removing the said pipes and machinery.

(7)

XIX.

It is further agreed, however, that the Lessors, upon the abandonment of any well by the Lessee, or upon its forfeiture of the right to operate the same, or upon the termination of this lease of ten (10) years, or the extension thereof for the further period of ten (10) years upon any one or more of said wells, shall have the option of purchasing any or all casing, pipes, or other fixtures, or either of them, placed in any well or wells, at the market price of such articles at the time of such purchase in Los Angeles. And the Lessee before the abandonment of any well, or before the drawing of any pipe from any such well, will give the Lessors prior written notice of ten (10) days of its intention to abandon such well or draw such pipe, in order that the Lessors may exercise the option of purchasing the above articles.

XX.

It is further agreed that in every case where a well is abandoned, the Lessee shall take such precautions as are proper under the circumstances to prevent the admixture of water with any oil strata which may be discovered in the well.

XXI.

It is agreed that the Lessee shall not, without the written consent of the Lessors first obtained, assign this lease, nor underlet any part thereof.

XXII.

The Lessee agrees that it will pay all taxes which may be assessed upon the machinery, tanks, and personalty used in connection with the operations upon said premises, and that it will pay all taxes hereafter levied upon the said premises during the term of this lease in excess of the taxes of this year levied and assessed against the same, in so far as said excess is caused by the production of oil thereon.

XXIII.

This is a lease, and not a mining partnership in any sense of the term, the parties hereto bearing to each other strictly the relation of landlord and tenant, and no other relation.

XXIV.

The strict and faithful performance of each and all of the covenants and agreements herein assumed by the Lessee are conditions of this lease, and upon its failure for thirty days after notice in writing so to do by the said Lessors, to faithfully keep and perform any one or the said covenants or agreements, this lease shall be forfeited and the Lessors shall be entitled to enter upon and exclude the Lessee from the said premises, and after such entry the Lessee shall be released from future obligations under this lease.

XXV.

The Lessors reserve the right to use, occupy and cultivate every part of said premises not actually required to be used by the Lessee in the performance of its covenants herein contained, and the exercise of its rights hereby granted.

XXVI.

Lessee agrees to pay all expenses and charges of every character in the fulfillment of the terms of this agreement, and to hold the said property free of all claims, demands and liens of every character which may be incurred by reason of its operations under this lease.

XXVII.

At the termination or legal cancellation of this lease upon the whole of said premises, or any part thereof, the Lessee will execute, acknowledge and deliver to the Lessors a formal release of that portion so cancelled or surrendered.

XXVIII.

With respect to the obligations herein assumed by the Lessee, time is of the essence of the contract, and the obligations herein assumed by it shall be held and construed as conditions precedent.

(9)

XXIX.

This lease is made subject to an agricultural lease to William Hill, which lease expires December 1, 1907, and has been exhibited to the Lessee herein. Should anything become due under the said lease to the said Hill for the occupation of land in boring for oil, the Lessors will pay the same to the Lessee.

XXX.

The Lessors herein reserve the right to bore for water upon said premises, and will report from time to time the character of the soil penetrated by such wells, and if at any time oil shall be found in any such well, the well shall be turned over to the Lessee herein, if it so desires, it paying the actual cost of the boring of said well.

XXXI.

The property covered by this lease is described as follows, to wit:

Being a part of the Rancho La Brea, in the county of Los Angeles, State of California, and being a part of that tract of land conveyed by Samuel R. Hancock to Bernardino Guirado and Albert M. Stephens, on the 28th day of December, 1899, by deed recorded in Book 1349, page 61 of Deeds.

The portion of said land covered by this lease is all that portion thereof bounded on the west by the lands of Wm. Niles, on the south by Fourth Street, on the east by lands of Gilmore, and on the north by an east and west line drawn from the northwest corner of said Gilmore's land to the eastern boundary line of the land of said Niles.

There is a mortgage of $13,000 existing upon the above described property, which the Lessors obligate themselves to hold the Lessee harmless from, and to pay the interest thereon promptly as the same becomes due, and the principal at maturity.

XXXII.

If property adjoining the leased premises on the east, south or west shall be drilled for oil, and oil shall be developed by such drilling, then as soon as such oil shall be developed, and within a reasonable time thereafter, the Lessee herein agrees that it will bore upon the leased premises well or wells so located and distributed as to secure for the parties hereto the oil lying underneath the leased premises nearest the point of development on such adjoining lands; provided, however, that this provision shall not be construed as requiring the Lessees to place any additional rigs upon the said property for the purposes of development thereof.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first above written.

Margarita Guirado Dallugge
Adolph Ramish
Martin C. Marsh by A Ramish
Albert M. Stephens
The Garbutt Oil Company

By Frank A Garbutt
President

And Moye W. Stephens
Secy.

EXHIBIT 2

A meeting of the Board of Directors of the Garbutt Oil Company was held at the office of the Company, Room 530 Wilcox Building, Los Angeles, Monday, April 10th, 1911, at 11:00 o'clock A. M.

Those present were, Messrs. W. L. Stewart, Adolph Ramish, R. A. Dallugge.

The following resolution was made, seconded and unanimously carried:

BE IT RESOLVED that the oil produced by this company since the first of January, 1911, shall be assigned to the lessors to the extent of their royalty, and to the stockholders to the extent of their holdings of stock, in the proportions to which they are severally entitled to receive it,—in kind; so long as the stockholders severally pay calls of the superintendent and secretary for money necessary to cover all expenses of the Company, said calls for money to be paid by the 14th day of each month for the expenses of the current month; and if any stockholder shall fail to pay his proportion for such current expenses, then the right of such stockholder to receive such oil in kind shall cease, and shall pass back to the company.

BE IT FURTHER RESOLVED that this arrangement shall continue for the remainder of the calendar year 1911.

BE IT FURTHER RESOLVED that if the stockholders Mrs. Dallugge, Adolph Ramish and Martin C.

Marsh shall request the same, this corporation, without further action on the part of its Board, shall enter into a contract with the Union Oil Co. for the sale of its oil, for the period expiring March 1, 1914, upon the same terms and conditions as expressed in a contract signed by the Albert M. Stephens Co. with the Union Oil Co., and now in the possession of said Union Oil Co.; and in the event that the said stockholders shall so request, then the President and Secretary of this corporation are hereby authorized, directed and empowered in the name and under the seal of this corporation, to enter into such contract on behalf of this corporation, with the Union Oil Co.

The oil so assigned to the several shareholders of the corporation is to be assigned to them in the tanks of the corporation, and the expense of delivery from the tanks of the corporation is to be charged against each individual so receiving his oil, in severalty.

The meeting then adjourned.

MOYE W. STEPHENS, Sec'y.

[Endorsed]: Filed Apr. 4, 1935 R. S. Zimmerman, Clerk By M. R. Winchell, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

Memorandum of Conclusions, Judge Hollzer,
Dec. 31, 1935

It appearing that within the time allowed by law for the filing of a refund claim, plaintiff filed with the Collector of Internal Revenue its claim for refund of $3,105.65 of its taxes for the calendar year 1919, a true copy of which claim is attached to the complaint herein and marked Exhibit B, that the sole ground upon which such refund was sought was the contention that the taxpayer was entitled to a deduction for amortization of the cost of a drilling; and

It further appearing that after the expiration of the period of limitation within which such a refund claim might be filed, but before the Commissioner had ruled upon its claim as originally presented, plaintiff filed an amended claim based upon the ground that it realized no taxable income during the calendar year 1919; and

It further appearing that in its claim for refund as originally filed plaintiff conceded that for income tax purposes it was chargeable with income in a sum representing the difference between the market value of oil produced through the operation of its oil lease and the cost of producing such oil, whereas by the filing of the amended claim for refund, plaintiff took the inconsistent position to the effect that, since all oil produced by it was distrib-

uted to its stockholders in kind, plaintiff realized no taxable income during the calendar year 1919;

The court concludes that the filing of plaintiff's so-called amended claim did not constitute an amendment, but in effect an abandonment of its original claim, and the same having been filed after the expiration of the period allowed for the filing thereof, plaintiff's right to sue herein is barred for the reason that such claim was filed too late.

Counsel for defendant are directed to prepare and serve proposed findings and judgment in conformity with this memorandum and to incorporate therein a recital allowing an exception for plaintiff.

(Copies to counsel)

[Endorsed]: Filed Dec. 31, 1935 R. S. Zimmerman, Clerk By M. R. Winchell, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case came on regularly for trial on the 4th day of April, 1935, before the Court, sitting without a jury, a trial by jury having been waived by written stipulation of the parties thereto; plaintiff appearing by Claude I. Parker and Bayley Kohlmeier, Esquires, and the defendant appearing by Peirson M. Hall, United States Attorney for the Southern District of California, Alva C. Baird, Assistant United States Attorney for said district, and Eugene Harpole, Special Attorney, United States Internal Revenue Bureau, and evidence, both oral and documentary, having been received and the Court having fully considered the same, hereby makes the following Special Findings of Fact:

FINDINGS OF FACT

I

That the Plaintiff is and, during all of the time pertinent to this action, was a California corporation, and the Defendant a sovereign body politic.

II

That on March 15, 1920, the Plaintiff filed its income and profits tax return for the calendar year 1919 with the Collector of Internal Revenue at Los Angeles, California, disclosing a tax of $2,072.68, which sum was paid in installments according to law in the year 1920.

III

That upon the audit of Plaintiff's income and profits tax return for the calendar year 1919 the United States Commissioner of Internal Revenue determined and assessed an additional tax in the sum of $3,105.65 against the plaintiff for said year.

IV

That Plaintiff paid the additional tax in the sum of $3,105.65 assessed against it for the calendar year 1919 on April 3, 1925.

V

Thereafter and on the 30th day of March, 1929, Plaintiff filed a claim for refund of the sum of $3,105.65 paid by it as additional taxes for the calendar year 1919, wherein it set out the following reasons why said claim should be allowed:

"The amount set out on line three above represents income and profits tax assessed against claimant for the calendar year 1919 and made up as follows:

Assessed on original return	$2,072.68
Additional assessed on basis of Commissioner's audit	3,105.65
	$5,178.33

The tax assessed on the original return was paid within the year 1920 and the additional tax was paid with check drawn in favor of the Collector of Internal Revenue at

Los Angeles, California, dated March 31, 1925. It is now contended that the whole amount of additional tax paid should be refunded for the reasons set out below.

According to information given by the Commissioner in his letter addressed to claimant corporation under date of August 18, 1927 the additional tax liability was determined as follows:

'Net income as disclosed by return	$ 16,928.61
As corrected	20,692.03

Additional income:

(a) Excessive depletion	$ 3,763.42

Explanation of Item changed

(a) Excessive depletion—	
March 1, 1913 value of lease	$126,932.00
Estimated recoverable reserves	507,728 bbls.
Production for year	44,099
Depletion sustained	$ 11,024.75
Depletion taken	14,788.17
Excessive depletion	3,763.42

In view of the fact that the profits tax as computed under Section 302 of the Revenue Act of 1918 is in excess of the tax as computed under Section 301 of the same Act, you have been given the benefit of the computation of tax under Section 302.

Computation of Tax, 1919 Rates

Excess Profits Tax

Section 302			Tax
Net income for year		$20,692.03	
Less:			
Amount taxable @ 20%	$17,000.00		$3,400.00
Amount taxable @ 40%	692.03	20,692.03	276.81
Excess profits tax			$3,676.81

Income Tax

Net income taxable year		$20,692.03	
Less:			
Exemption	$ 2,000.00		
Excess profits tax	3,676.81	5,676.81	
Balance taxable at 10%		$15,015.22	
Income tax			$1,501.52
Total income and profits tax			$5,178.33
Previously assessed			2,072.68
Additional to be assessed			$3,105.65

Exception is taken to the Commissioner's determination of taxable net income and to his computation of the excess profits tax under Section 302 of the Revenue Act of 1918 rather than under the provisions of Section 301 based on allowable invested capital.

As to the determination of net income it is contended that said net income was overstated to the extent of $12,500.00, by reason of the following:

This corporation was organized during the latter part of the year 1907 with an authorized capital stock of $500,000.00. Under contract dated November 3, 1907, it was provided that on the organization of the corporation one-half of its authorized capital stock should be issued fully paid up to the then owners of an oil lease and one-half of said authorized capital stock should be issued to the Union Oil Company of California. The consideration in the first instance being the transfer of the lease to the corporation and in the second instance an agreement on the part of the Union Oil Company of California to provide the expenses of developing the property for which it was to be reimbursed only out of any oil which might be produced.

Although the agreement referred to provided that an equal amount of the Company's capital stock should be set up for the lease and contract, viz.: $250,000.00 of par value, said assets were taken up on the books as follows:

Contract with Union Oil Co.	$250,000.00
Lease	187,500.00
Stock Discount	62,500.00
Total—	$500,000.00

However, the Commissioner has apparently conceded that the lease cost claimant corporation $250,000.00. In this connection reference is made to letter addressed to claimant corporation by the Commissioner relative to the determination of its tax liability for the year 1918, said letter being dated February 3, 1925, IT:CR:G-2-MPS. In said letter the adjustments with respect to invested capital are set forth as follows:

'Invested capital as disclosed by return	$391,551.54
As corrected	28,364.50
Deductions	$363,187.04

Deductions:

(a) Stock discount disallowed	$ 43,750.00
(b) Contract with Union Oil Co. disallowed	250,000.00
(c) Value of lease decreased	69,347.79
(d) 1917 taxes prorated	89.25
Total deductions	$363,187.04

(a) Stock discount disallowed $43,750.00

Discount on the sale of capital stock is not allowable as invested capital.

(b) Contract with Union Oil Company disallowed $250,-000.00.

Inasmuch as this contract had no value as at January 1, 1918, it is not allowable for invested capital purposes.

(c) Value of lease decreased $69,347.79.

Value as shown on return	$133,093.54
Value as corrected based on cost less depletion	63,745.75
Decrease	$ 69,347.79

(d) 1917 taxes prorated $89.25

The tax due for 1917 in the amount of $162.87 is prorated from invested capital for 200 days as follows:

$162.87 multiplied by 200/365 equals $89.25.'

From the foregoing it is apparent that an undepleted cost of $63,745.75 for the lease has been determined as of January 1, 1918. Based on the assumption that the Commissioner has allowed $250,000.00 as the original cost of the lease when acquired by the corporation in 1907, and since an equal amount of capital stock was issued to the Union Oil Company of California for entering into the contract, it is concluded that the same cost should be assigned for the contract as was allowed for the lease. It is submitted that the said contract was valuable to claimant corporation throughout the entire life of the lease and that it was in error in writing same off its books during the year 1918.

Had it not been for the contract whereby the Union Oil Company of California agreed to develop the property and take a chance of securing reimbursement for the cost of such development, if, and when, oil was produced from the property, it might not have been possible for claimant corporation to have provided funds for the development

of its property, thereby enabling it to realize an income from said property during the life of the lease. It is therefore contended that whatever cost is assigned to the contract should be ratably spread over the period of the lease. On this basis the cost of said contract should be amortized over a twenty-year period and one-twentieth (1/20) thereof should be allowable as a deduction for each year of said period. By using a cost for the contract of $250,000.00, the allowance for amortization applicable to the year 1919 would be $12,500.00. It is therefore submitted that the net income determined by the Commissioner for the year 1919 should be reduced to the extent of $12,500.00, thereby making a revised net income of $8,192.03.

The invested capital as shown on the return filed by claimant for the year 1919 was $133,842.38. In the balance sheet as of January 1, 1919, attached to said return, the lease was shown at $118,305.37. No cost is shown on said balance sheet for the contract with the Union Oil Company of California, neither is the stock discount of $43,750.00 shown as an asset. Therefore, in order to bring the invested capital for the year 1919 to the same basis as was determined by the Commissioner for the year 1918, the following adjustments should be made:

As an unreturned cost was determined for the lease by the Commissioner as of January 1, 1918 of $63,745.75, and a depletion was allowed for said year of $10,647.50, the unreturned cost for the lease as of January 1, 1919 would be $53,098.25, as compared to the $118,305.37 shown by the company's balance sheet as of January 1, 1919, so that a reduction in the invested capital as claimed on this account should be $65,207.12.

Since the unamortized cost of the contract with the Union Oil Company is not reflected in the invested capital as claimed by the corporation, it is submitted that in line with the above contentions the original cost of said contract less accumulated amortization down to January 1, 1919 should be included as a part of the company's invested capital for the year 1919. The addition to invested capital on account of this contract would be determined as follows:

Original cost of contract	$250,000.00
Less amount returnable through amortization October 3, 1907 to Dec. 31, 1918 (11 years and 3 months)	140,625.00
Unreturned cost	$109,375.00

On the basis of the foregoing a revised invested capital would be arrived at as follows:

Amount claimed on the return	$133,842.38
Less excessive cost of lease eliminated	65,207.12
Difference	$ 57,635.26
Plus unreturned cost of contract, as above	109,375.00
Revised invested capital	$167,010.26

Excess Profits Credit:

8% of $167,010.26	$ 13,360.82
Special exemption	3,000.00
Total credit	$ 16,360.82

Since the total credit exceeds the revised income of $8,192.03, as above set out, no profits tax liability would be due. The income tax would then be shown as follows:

Net income as revised	$8,192.03	
Less exemption	2,000.00	
Balance taxable at 10%	6,192.03	$ 619.20
Amount paid		5,178.33
Amount overpaid		$ 4,559.13

In view of the foregoing, it is submitted that this corporation should have returned to it the full amount of additional tax paid within the four years preceding the filing of this claim, viz., $3,105.65, with interest computed thereon in accordance with the provisions of existing law."

VI

That thereafter and on the 31st day of May, 1929, Plaintiff filed an instrument entitled "Statement of Garbutt Oil Company, Los Angeles, California, for the Purpose of Perfecting and Completing Claim for Refund Covering Alleged Overpayment of Income Tax for the Calendar Year 1919", with the United States Commissioner of Internal Revenue wherein the following reasons for allowance of the refund claimed were advanced:

"Los Angeles, California,
May 20, 1929

Hon. David H. Blair
Commissioner Internal Revenue
Washington, D. C.

Sir:

Reference is made to claim for refund in the amount of $3,105.65, filed by Garbutt Oil Company with principal place of business at Union Oil Building, Los Angeles, California, with the Collector for the Sixth District of California on or about March 29, 1929, covering overpayment of income tax alleged to have been made for the calendar year 1919. The claim was based upon the grounds that

(a) The net income of the corporation was overstated to the extent of $12,500.00, because of the Commissioner's failure to allow a deduction for the amortization of the value of a certain contract entered into with the Union Oil Company of California, for which capital stock was issued having a par value of $250,000.00; and

(b) That the invested capital as determined by the Commissioner was overstated by reason of the Commissioner's failure to include therein any portion of the cost to the company of the above-mentioned contract entered into with the Union Oil Company of California.

It now develops that a further reason exists in support of said claim for refund which is as follows:

Commencing with the year 1911 the arrangement entered into between the Garbutt Oil Company and the

Union Oil Company of California, which owned 50% of said stock, was to the effect that the stockholders were to pay in to the company a sufficient amount to cover the operating expenses and they were to receive the oil produced by the company and sell it themselves. Under this arrangement the company received none of the proceeds derived from the sale of the oil, although it appears for bookkeeping purposes the oil was considered distributed to the stockholders at its market value when distributed and the difference between the expense of operation and the market value of the oil when distributed was accounted for as income to the Government.

As a matter of fact, the Garbutt Oil Company distributed assets in kind to its stockholders and they were entitled to treat the property so received as a dividend, which under the income tax law and regulations they should have accounted for at the market value of the property, in this case consisting of crude oil at its market value when received.

In this connection attention is called to statement appearing in recent letter from the Commissioner's office addressed to the Union Oil Company of California, setting forth the final adjustments made in its income and profits tax liability for the year 1918 and subsequent years. The particular statement in the Commissioner's letter to which attention is directed appears under Schedule 1-A, and is as follows:

'The Union Oil Company owning 50% of the stock of the Garbutt Oil Company received from it each year one-half of the oil produced and paid one-half of its expenses. As the Garbutt Oil Company is a domestic corporation subject to tax on its net income the value of the oil received

by the Union Oil Company in excess of expenses paid is here treated as a dividend received.'

In addition to the foregoing, it is further submitted that the Internal Revenue Bureau heretofore consistently has recognized the fact that under the Revenue Acts in force prior to the Revenue Act of 1928, a corporation realizes neither profit nor loss in the distribution of its assets to its stockholders.

By eliminating the fictitious gross profits or appreciation taken up on the return of the Garbutt Oil Company for the year 1919, arising from the distribution of the oil produced in the manner hereinbefore explained, no taxable profit results, and it therefore follows that even though the specific grounds set forth in the claim for refund are denied said claim should, nevertheless, be allowed in full for the reasons herein set forth.

It is therefore respectfully urged that the amount by which the Garbutt Oil Company has overpaid its correct tax liability for the year 1919, viz., $5,178.33, or so much thereof as is property refundable within the statute of limitations, be refunded together with interest computed thereon as provided by existing law.

Respectfully submitted,

GARBUTT OIL COMPANY
By MOYE W. STEPHENS.

V

That Plaintiff predicates its right to recover in this action upon reasons set forth for the first time in the statement filed on May 31, 1929.

VI

As to the extent recited in his letter of August 12, 1929, the Commissioner of Internal Revenue undertook to treat the supplemental statement filed by the plaintiff corporation with him on May 31, 1929, as a valid amendment of plaintiff's original claim for refund of 1919 filed with the Commissioner on March 30, 1929, and also undertook to consider on their merits the contentions and grounds advanced by plaintiff in its supplemental statement of May 31, 1929; that in said letter dated August 12, 1929, the Commissioner made the following statements:

"You further contend that inasmuch as the taxpayer entered into an agreement with its stockholders in 1911 for said stockholders to pay into the company sufficient funds to pay the expenses and the company was to turn over to the stockholders all the oil produced for them to sell, that the Garbutt Oil Company distributed to its stockholders assets in kind and that no taxable profit accrued to the taxpayer.

"This office holds that the distribution of oil in excess of the expenses contributed represents a distribution of profits which are taxable to the corporation.

VII

That on October 3, 1907, plaintiff acquired a lease of certain oil property. That during the year 1919 plaintiff's only business activity was the production of oil from said leased property.

VIII

That on the 10th day of April, 1911, plaintiff corporation by its Board of Directors duly adopted a resolution providing in effect that all oil produced by plaintiff after

January 1, 1911, should be assigned to plaintiff's lessors upon the aforementioned lease to the extent of their royalty and to plaintiff's stockholders to the extent of their holdings of stock pro rata in kind so long as the stockholders should pay calls for money necessary to cover all expenses of plaintiff. That said resolution remained in full force and effect at all times subsequent to April 10, 1911, to and including the entire year 1919. That pursuant to said resolution all oil produced by plaintiff during the calendar year 1919 was distributed in kind respectively to the lessors to the extent of their royalty and to the stockholders in proportion to their holdings of stock.

CONCLUSIONS OF LAW

I

That the statement filed by Plaintiff on May 31, 1929, did not constitute an amendment of its claim for refund of additional taxes paid for the calendar year 1919 filed on March 30, 1929, but did amount to an abandonment of the reasons advanced in said claim for the allowance of the refund claimed therein.

II

That the plaintiff was barred at all times subsequent to April 3, 1929, from filing a claim for refund of the additional tax paid for the year 1919 on April 3, 1925, by the provisions of Section 284(b) of the Revenue Act of 1926.

III

That Plaintiff, by reason of its having for the first time raised the contention that it realized no taxable income during the calendar year 1919 subsequent to the expiration of the period allowed by Section 284(b) of the Rev-

enue Act of 1926 for filing a claim for refund and having abandoned all of the reasons set forth in its claim for refund filed on March 30, 1929, is barred by the limitation of said statute from recovery in this action.

IV

That during the calendar year 1919, Plaintiff realized nothing from the production and distribution of oil and did not discharge any liability thereby and realized no taxable income.

V

The Defendant is entitled to judgment against Plaintiff for its costs.

Approved and adopted this 10 day of March, 1936, with an exception allowed to Plaintiff; and an exception is allowed the Defendant as to the adoption of Conclusion of Law numbered IV.

Hollzer
UNITED STATES DISTRICT JUDGE

Approved as to Form as required by Rule 44:

Bayley Kohlmeier
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 10, 1936 R. S. Zimmerman, By M. R. Winchell, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

GARBUTT OIL COMPANY, a corporation,	)	
Plaintiff,	)	No. 5094-H
-v-	)	
	)	JUDGMENT
UNITED STATES OF AMERICA,	)	
Defendant.	)	

The above entitled cause came on regularly for trial on the 4th day of April, 1935, before the above-entitled Court, the Honorable Harry A. Hollzer, presiding, sitting without aid or intervention of a jury, a trial by jury having been waived by written stipulation of the parties hereto; Claude I. Parker, George H. Koster and Bayley Kohlmeier appearing as counsel for plaintiff, and Peirson M. Hall, United States Attorney for the Southern District of California, and Eugene Harpole, Special Attorney for the United States Bureau of Internal Revenue, appearing as counsel for the defendant, a partial stipulation of facts having been filed and both oral and documentary evidence having been introduced and the cause submitted for decision:

WHEREFORE, by reason of the law and the facts herein, IT IS ORDERED, ADJUDGED AND DECREED that the defendant do have and recover of the plaintiff his costs taxed in the sum of $16.00.

Dated March 10, 1936.

Hollzer

JUDGE OF THE UNITED STATES DISTRICT COURT

Approved as to form as provided by Rule 44:

Bayley Kohlmeier

Attorneys for Plaintiff.

Judgment entered and recorded MAR. 10 1936.

R. S. ZIMMERMAN, Clerk

By M. R. Winchell

Deputy Clerk.

[Endorsed]: Filed Mar. 10, 1936 R. S. Zimmerman, Clerk By M. R. Winchell, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL

TO THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, AND TO HONORABLE HARRY A. HOLLZER, JUDGE THEREOF:

Your petitioner, the Garbutt Oil Company, the plaintiff in the above entitled cause, feeling aggrieved by the judgment rendered herein in favor of the defendant and entered on the tenth day of March, 1936, prays that an appeal may be allowed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith in order that the errors complained of may be corrected, and petitioner further prays that a citation be issued, as by law provided, commanding the defendant to appear before said Circuit Court of Appeals and that an order be made fixing the amount of the cost bond which plaintiff shall give and furnish upon said appeal and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

June 2, 1936.

Claude I. Parker
Claude I. Parker
Bayley Kohlmeier
Bayley Kohlmeier
Counsel for Plaintiff,
808 Bank of America Building,
Los Angeles, California.

[Endorsed]: Filed Jun. 2, 1936 R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

GARBUTT OIL COMPANY, a corporation, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	No. 5094-H ASSIGNMENT OF ERRORS

Comes now the Garbutt Oil Company, plaintiff in the above entitled cause, and makes and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause from the judgment of this Court entered on the 10th day of March, 1936.

I.

The Court erred in rendering and entering its decision and judgment in favor of defendant and against the plaintiff for the reason that said decision and judgment is contrary to the law and is not supported by the evidence or by the facts as found by the Court, or the facts as admitted by the pleadings and stipulated by the parties.

II.

The Court erred in denying plaintiff's motion for judgment for the reason that upon the evidence and upon the facts found by the Court, admitted by the pleadings and stipulated by the parties, the plaintiff is entitled to recover judgment as a matter of law.

III.

The Court erred in disallowing and refusing to adopt plaintiff's requested conclusion of law II-(1) for the reason that said conclusion of law is supported by the evidence and by the facts found by the Court, admitted by the pleadings and stipulated by the parties.

IV.

The Court erred in disallowing and refusing to adopt plaintiff's requested conclusion of law II-(2) for the reason that said conclusion of law is supported by the evidence and by the facts found by the Court, admitted by the pleadings and stipulated by the parties.

V.

The Court erred in disallowing and refusing to adopt plaintiff's requested conclusion of law II-(3) for the reason that said conclusion of law is supported by the evidence and by the facts found by the Court, admitted by the pleadings and stipulated by the parties.

VI.

The Court erred in disallowing and refusing to adopt plaintiff's requested conclusion of law II-(4) for the

reason that said conclusion of law is supported by the evidence and by the facts found by the Court, admitted by the pleadings and stipulated by the parties.

VII.

The Court erred in disallowing and refusing to adopt plaintiff's requested conclusion of law II-(6) for the reason that said conclusion of law is supported by the evidence and by the facts found by the Court, admitted by the pleadings and stipulated by the parties.

VIII.

The Court erred in disallowing and refusing to adopt plaintiff's requested conclusion of law II-(7) for the reason that said conclusion of law is supported by the evidence and by the facts found by the Court, admitted by the pleadings and stipulated by the parties.

IX.

The Court erred in making and adopting its conclusion of law numbered I for the reason that said conclusion of law is not supported by and is contrary to the facts as established by the evidence and the facts found by the Court, admitted by the pleadings and stipulated by the parties.

X.

The Court erred in making its conclusion of law numbered II for the reason that said conclusion of law is not

supported by and is contrary to the facts as established by the evidence and the facts found by the Court, admitted by the pleadings and stipulated by the parties.

XI.

The Court erred in making its conclusion of law numbered III for the reason that said conclusion of law is not supported by and is contrary to the facts as established by the evidence and the facts found by the Court, admitted by the pleadings and stipulated by the parties.

XII.

The Court erred in making its conclusion of law numbered V for the reason that said conclusion of law is not supported by and is contrary to the facts as established by the evidence and the facts found by the Court, admitted by the pleadings and stipulated by the parties.

XIII.

The Court erred as a matter of law in finding and concluding that the statement filed by plaintiff on May 31, 1929 did not constitute an amendment of its claim for refund of additional taxes paid for the calendar year 1919 filed on March 30, 1929.

XIV.

The Court erred as a matter of law in finding and concluding that the statement filed by plaintiff on May 31, 1929 amounted to an abandonment of the reasons advanced in the claim for refund filed March 30, 1929 for the allowance of the refund claimed therein.

XV.

The Court erred as a matter of law in failing and refusing to find that the statement filed by plaintiff on May 31, 1929 was a valid and timely amendment of its claim for refund filed on March 30, 1929 for the refund of taxes paid for the calendar year 1919.

XVI.

The Court erred in finding and concluding that plaintiff is barred by the limitation of Section 284(b) of the Revenue Act of 1926 from recovery in this action.

XVII.

The Court erred in failing and refusing to find that the claim for refund of taxes paid for the calendar year 1919, filed by plaintiff on March 30, 1929, as amended by the statement filed on May 31, 1929, constituted a proper, sufficient and timely claim for refund within the meaning of Section 284(b) of the Revenue Act of 1926.

XVIII.

The Court erred in failing and refusing to find that in considering plaintiff's claim for refund as amended by the statement filed on May 31, 1929 on its merits the Commissioner of Internal Revenue waived any defects or insufficiency in said claim for refund.

XIX.

The Court erred in failing and refusing to find that by treating said statement of May 31, 1929 as an amendment of plaintiff's original claim for refund for the year 1919,

filed on March 30, 1929, and by considering on their merits the contentions and grounds advanced in said statement of May 31, 1929, the Commissioner of Internal Revenue waived any objection which he might have had that said statement of May 31, 1929 was not timely presented.

XX.

The Court erred in failing and refusing to render and enter judgment in favor of plaintiff for the reason that upon the facts found by the Court and the facts admitted by the pleadings and stipulated by the parties, plaintiff is entitled to judgment as a matter of law.

XXI.

The Court erred in finding and concluding that the defendant is entitled to judgment against plaintiff for its costs.

WHEREFORE, plaintiff prays that said judgment may be reversed and for such other and further relief as to the Court may seem just and proper.

Claude I. Parker
Claude I. Parker
Bayley Kohlmeier
Bayley Kohlmeier
Counsel for Plaintiff.

DATED: This 2nd day of June, 1936.

[Endorsed]: Filed Jun. 2, 1936 R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF COST BOND.

The plaintiff in the above entitled cause, having filed herein and presented to the Court its Petition for Appeal, together with its Assignment of Errors, praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered herein and entered on March 10, 1936, and praying further for an order fixing the amount of the cost bond and for an order for issue of citation and for transmittal of the record to the United States Circuit Court of Appeals for the Ninth Circuit;

IT IS ORDERED that the appeal as prayed for in said petition be and the same is hereby allowed for the review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision and judgment of the above entitled court referred to in said petition and that the amount of the cost bond to be given by said plaintiff and appellant upon appeal be and the same is hereby fixed at the sum of $250.00.

IT IS HEREBY FURTHER ORDERED that a duly authenticated transcript of the record, proceedings and papers in this cause be transmitted to the United States Circuit of Appeals for the Ninth Circuit.

DATED: This 2 day of June, 1936.

Hollzer
United States District Judge.

[Endorsed]: Filed Jun. 2, 1936. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto the UNITED STATES OF AMERICA, defendant in the above entitled case, in the penal sum of Two Hundred Fifty and No/100 ($250.00) Dollars, to be paid to said Defendant, its successors, assigns or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That Whereas, GARBUTT OIL COMPANY, a corporation, Plaintiff, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment made and entered on the 10th day of March, 1936, by the United States District Court for the Southern District of California, Southern Division, in the above entitled case.

NOW, THEREFORE, if the above named appellant shall prosecute said appeal to effect and answer all costs which may be adjudged against it if it fails to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed and dated this 2nd day of June, 1936.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

[Seal]

By W. H. Cantwell
Attorney in Fact

Attest D. M. Ladd
Agent.

STATE OF CALIFORNIA)
) ss:
County of Los Angeles)

On this 2nd day of June, 1936, before me S. M. Smith, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. H. Cantwell and D. M. Ladd known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] S. M. Smith
Notary Public in and for the State of California,
County of Los Angeles.

Examined and recommended for approval as provided in Rule 29.

Bayley Kohlmeier
Attorney

Approved this 3rd day of June, 1936.

Hollzer
District Judge.

[Endorsed]: Filed Jun 4-1936 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

AMENDED PRAECIPE

TO THE CLERK OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit on or before July 2, 1936, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following papers and documents:

1. All docket entries of proceedings before the Court, including all court orders.

2. Pleadings before the Court.

3. Waiver of Jury Trial.

4. Stipulation of Facts filed at the time of trial.

5. Memorandum of Conclusions, Judge Hollzer, December 31, 1935.

6. Findings of Fact and Conclusions of Law.

7. Judgment.

8. Petition for and Order Allowing Appeal and Fixing Amount of Bond.

9. Assignment of Errors.

10. Bond on Appeal.

11. This Amended Praecipe for Transcript of Record.

12. Citation on Appeal.

13. Admission of Service of Citation.

14. Clerk's Certificate.

DATED: This 19th day of June, 1936.

Claude I. Parker
Claude I. Parker
Bayley Kohlmeier
Bayley Kohlmeier
Counsel for Plaintiff,
808 Bank of America Building,
Los Angeles, California.

Service of the above Amended Praecipe and receipt of a copy thereof is hereby accepted and acknowledged, June 19, 1936.

Peirson M. Hall
U. S. Atty.
By Clyde Thomas
Asst U. S. Atty.
Counsel for Defendant.

[Endorsed]: Filed Jun. 23, 1936 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 82 pages, numbered from 1 to 82 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; all docket entries; complaint; answer to complaint; waiver of jury trial; stipulation of facts; memorandum of conclusions; special findings of fact and conclusions of law; judgment; petition for appeal; assignment of errors; order allowing appeal; stipulation for costs on appeal, and amended praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of July, in the year of Our Lord One Thousand Nine Hundred and Thirty-six and of our Independence the One Hundred and Sixty-first.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8281

Excerpt from Proceedings of Wednesday, March 31, 1937

Before WILBUR and MATHEWS, Circuit Judges, and NETERER, District Judge

Order of submission

ORDERED appeal in above cause argued by Mr. Bayley Kohlmeier, counsel for appellant, and by Mr. Harry Marselli, Special Assistant to the Attorney General, counsel for appellee, and submitted to the court for consideration and decision.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8281

Excerpt from Proceedings of Wednesday, April 28, 1937

Before WILBUR and MATHEWS, Circuit Judges, and NETERER, District Judge

Order directing filing of opinion and filing and recording of judgment

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8281

GARBUTT OIL COMPANY (A CORPORATION), APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Opinion

April 28, 1937

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

Before WILBUR and MATHEWS, Circuit Judges, and NETERER, District Judge

NETERER, *District Judge:* This suit is to recover an over-payment of income taxes for the year ending 1919. The appellee pleaded the Statute of Limitations. Judgment was entered for the appellee March 10, 1936, and reversal is sought.

A trial by jury was waived and the court made findings of fact and conclusions, as required by statute, and found in substance that the appellant is a California corporation; that on October 3, 1907, it leased certain oil land and thereafter oil was discovered thereon and thereafter appellant's sole business was the production and distribution of oil from this property. On April 10, 1911, appellant's Board of Directors adopted a resolution to the effect that all oil produced by it after January 1, 1911, should be assigned to appellant's lessors to the extent of their royalty interest and to appellant's stockholders to the extent of their holdings of stock "pro rata in kind", so long as the stockholder should pay calls for money necessary to cover all expenses of appellant. All oil produced thereafter by the appellant from the date *supra* throughout the year 1919 was, pursuant to this arrangement, distributed in kind, respectively, to the lessors and the stockholders of appellant to the extent of their royalty and in proportion to their holdings of stock, respectively.

For the year 1919 appellant reported net income in the amount of $16,928.61 and a tax liability for the year of $2,072.68, which tax was, during 1920, paid. Thereafter the Commissioner of Internal Revenue for the proper District determined and assessed an additional tax of $3,105.65 against appellant for the year 1919. This tax appellant paid April 3, 1925.

On March 30, 1929, appellant filed with the Collector of Internal Revenue for the proper District its claim for refund on Form 843 of income and excess profits taxes over-paid for the year 1919 in the amount of $3,105.65. The refund was claimed on the grounds (1) that appellant was entitled to an additional deduction for amortization of the cost of a certain drilling contract, and (2) that its invested capital had been understated.

On May 31, 1929, before the March 30, 1929, refund application was determined, appellant filed a paper on oath with the Collector of Internal Revenue entitled, "Statement of Garbutt Oil Company * * * For the Purpose of Perfecting and Completing Claim for Refund Covering Alleged Over-payment of Income Tax for the Calendar Year 1919", and claimed refund for the following reasons:

"Reference is made to claim for refund in the amount of $3,105.65, filed by Garbutt Oil Company with principal place of business at Union Oil Building, Los Angeles, California, with the Collector for the Sixth District of California on or about March 29, 1929, covering over-payment of income tax alleged to have been made for the calendar year 1919. The claim was based upon the grounds that

"(a) The net income of the corporation was overstated to the extent of $12,500.00, because of the Commissioner's failure to allow a deduction for the amortization of the value of a certain contract entered into with the Union Oil Company of California, for which capital stock was issued having a par value of $250,000.00; and

"(b) That the invested capital as determined by the Commissioner was overstated by reason of the Commissioner's failure to include therein any portion of the cost to the Company of the above-mentioned contract entered into with the Union Oil Company of California.

"It now develops that a further reason exists in support of said claim for refund which is as follows:

"Commencing with the year 1911 the arrangement entered into between the Garbutt Oil Company and the Union Oil Company of California, which owned 50% of said stock, was to the effect that the stockholders were to pay in to the company a sufficient amount to cover the operating expenses and they were to receive the oil produced by the company and sell it themselves. Under this arrangement the company received none of the proceeds derived from the sale of the oil, although it appears for bookkeeping purposes the oil was considered distributed to the stockholders at its market value when distributed and the difference between the expense of operation and the market value of the oil when distributed was accounted for as income to the Government.

"As a matter of fact, the Garbutt Oil Company distributed assets in kind to its stockholders and they were entitled to treat the property so received as a dividend, which under the income tax law and regulations they should have accounted for at the market value of the property, in this case consisting of crude oil at its market value when received.

"In this connection attention is called to statement appearing in recent letter from the Commissioner's office addressed to the Union Oil Company of California, setting forth the final adjustments made in its income and profits tax liability for the year 1918 and subsequent years. The particular statement in the Commissioner's letter to which attention is directed appears under Schedule 1–A, and is as follows:

"'The Union Oil Company owning 50% of the stock of the Garbutt Oil Company received from it each year one-half of the oil produced and paid one-half of its expenses. As the Garbutt Oil Company is a domestic corporation subject to tax on its net income the value of the oil received by the Union Oil Company in excess of expenses paid is here treated as a dividend received.'

"In addition to the foregoing, it is further submitted that the Internal Revenue Bureau heretofore consistently had recognized the fact that under the Revenue Acts in force prior to the Revenue Act of 1928, a corporation realizes neither profit nor loss in the distribution of its assets to its stockholders.

"By eliminating the fictitious gross profits or appreciation taken up on the return of the Garbutt Oil Company for the year 1919, arising from the distribution of the oil produced in the manner hereinbefore explained, no taxable profit results, and it therefore follows that even though the specific grounds set forth in the claim for refund are denied said claim should, nevertheless, be allowed in full for the reasons herein set forth.

"It is therefore respectfully urged that the amount by which the Garbutt Oil Company has overpaid its correct tax liability for the year 1919, viz, $5,178.33, or so much thereof as is properly refundable within the statute of limitations, be refunded together with interest computed thereon as provided by existing law."

The trial court found that plaintiff (appellant) predicates its right to recover in this action upon the reasons set forth for the first time in the statement filed May 31, 1929, and also found that the Commissioner of Internal Revenue undertook to treat this supplemental statement as an amendment to the original claim and to consider it on its merits and wrote to the appellant August 12, 1919, that the claim could not be allowed, as follows:

"You further contend that inasmuch as the taxpayer entered into an agreement with its stockholders in 1911 for said stockholders to pay into the company sufficient funds to pay the expenses and the company was to turn over to the stockholders all the oil produced for them to sell, that the Garbutt Oil Company distributed to its stockholders assets in kind and that no taxable profit accrued to the taxpayer.

"This office holds that the distribution of oil in excess of the expenses contributed represents a distribution of profits which are taxable to the corporation."

The trial court also found that the claim of May 31, 1929, was not an amendment of its claim filed March 30, 1929, but constituted an abandonment of the said claim and the substitution of an entirely new claim; that plaintiff (appellant) was barred subsequent to April 3, 1929, from filing a claim for refund for taxes paid April 3, 1925, for the year 1919 (Section 284 (b) of the Revenue Act of 1926); and having abandoned its claim for refund filed March 30, 1929, could not thereafter file an entirely new claim. It was admitted at bar that the claim filed March 30, 1929, was abandoned at the trial of the case.

We think the trial court erred in holding that the claim filed on the 31st day of May 1929 was a new claim and not an amendment to the claim filed on March 30, 1929. The amendment filed is germane to the original claim and asks for a refund of $5,178.33, whereas the first claim claimed a refund in the sum of $3,105.65. Both of these claims grew out of substantially the same facts and the claim had not been determined, the matter had not been adjudicated, and the same rules applied as in ordinary law actions. The fact that the first claim was abandoned at trial does not establish the fact it did not have sufficient vitality at the time the amendment was filed

to support the same. The same question is presented in this case as was answered by the Supreme Court, through Justice Cardozo, in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62–64:[1]

"May a claim for a tax refund which has been seasonably filed, but which fails to state the grounds upon which the refund is demanded, be amended by specifying the grounds at any time before the claim in its original form has been finally rejected, though it be after the time when a wholly new claim would be barred by limitation?"

On page 67, *supra:*

"Indefinite and general it was, and hence, until amended or supplemented, an inadequate compliance with the Treasury requirement that the facts relied upon in support of a claim are to be stated under oath. Beyond doubt it might have been rejected as irregular while its form was uncorrected. This is far from saying that there was the presentation of a new claim and not the perfecting of an old one when the gaps were filled thereafter."

In the instant case the application for refund was made in the proper form, but it stated a different ground for refund. Both grounds could have been consistently stated in the original claim. Undoubtedly the first claim could have been denied and if so before the limitation had run it would not have supported the amendment.

We think the judgment should be and is reversed.

(Endorsed:) Opinion. Filed Apr. 28, 1937. Paul P. O'Brien, *Clerk.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8281

GARBUTT OIL COMPANY, A CORPORATION, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE.

Judgment

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, reversed.

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[1] Compare *Bowers* v. *New York Trust Co.*, 9 F. (2d) 548 (C. C. A. 2); *Reid* v. *Rafferty*, 15 F. (2d) 264 (C. C. A. 2); *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373; *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28.

(Endorsed:) Judgment. Filed and entered April 28, 1937. Paul P. O'Brien, *Clerk*.

Certificate of clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under Rule 38 of the Revised Rules of the Supreme Court of the United States

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-three (93) pages, numbered from and including 1 to and including 93, to be a full, true, and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Hon. J. Stanley Reed, Solicitor General of the United States, counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 17th day of July A. D. 1937.

[SEAL] (Sgd.) PAUL P. O'BRIEN, *Clerk*.

U. S. GOVERNMENT PRINTING OFFICE: 1937

Order allowing certiorari

Filed October 11, 1937.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is assigned for hearing immediately following No. 48.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice BLACK took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1937